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### REMARKS

Applicant respectfully requests reconsideration of the application identified above. Claims 1-21 are pending. Claims 1, 10, 14 and 19 are currently amended. Applicant respectfully traverses the rejections as conceivably applied to the amended claims.

#### I. Summary of the Invention

The present invention relates to a device for manipulating landscaping materials, such as rocks, boulders and other large materials. The claimed invention can be generally classified as tongs in the sense that it includes pivotally interconnected arms that function in a tong-like manner. The tongs of the present invention are specially configured for the specific purpose of manipulating landscaping.

As defined in amended claim 1, the present invention is directed to a device for lifting/manipulating landscaping and other like materials having a first arm with an upper portion, a pivot portion and a lower portion; and a second arm with an upper portion, a pivot portion and a lower portion. The pivot portion of the first arm is pivotally connected to the pivot portion of the second arm. At least one of the pivot portions is offset, whereby the upper portion and the lower portion of the first arm extend along a common plane with the upper portion and the lower portion of the second arm.

As defined in amended claim 14, the present invention is directed to a device for lifting and manipulating landscaping and other like materials. The device includes a first arm, a second arm, a pivot joint pivotally interconnecting the first arm and the second arm. The pivot joint is configured such that the upper portion and the lower portion of the first arm and the

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upper portion and the lower portion of the second arm extend through a common plane. The device also includes a lift ring, a first shackle interconnecting the first arm to the lift ring, and a second shackle interconnecting the second arm to the lift ring.

As can be seen, the amended claims recite a device having first and second arms with upper and lower portions that extend through a common plane. The alignment between the upper and lower portions of the two arms addresses a number of deficiencies inherent in devices with misaligned arms. As discussed in more detail below, misaligned arms can result in unwanted torque that can damage the pivot joint and may cause undesirable twisting of the object being lifted.

## II. Objection

As originally presented, claim 10 was objected to on the basis of a typographical error. Claim 10 is amended as suggested by the Examiner to overcome this objection.

## III. Art Rejections

Applicant respectfully submits that the subject matter of the amended claims is patentable over the art of record. The claims relate to a device that is specifically configured for use in lifting/manipulating landscaping, which may include extremely heavy and irregularly shaped objects such as landscaping rocks and boulders. Although the prior art discloses a wide variety of tong-like structures, it is respectfully submitted that the subject matter of the claims is not anticipated by or obvious in view of the prior art. The claims recite a variety of structural improvements that distinguish the present invention from the tong-like devices of the prior art. The sheer number of prior art references applied in this case illustrates the large number of tong-

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like devices that have been developed over the years, and emphasizes the great degree to which tong-like devices are customized for specific applications. The cited references highlight the patentability of the claimed invention by illustrating a wide variety of specialty tongs that do not teach or suggest the subject matter of the amended claims. It is worthwhile to note that a wide variety of patents have been granted to different tong-like devices configured for specific applications despite their general similarity. It is respectfully submitted that the distinctions between the claimed invention and the prior art devices are at least as material as the distinctions between the various patented prior art devices.

A. Rejections based on Samsel, Jr.

As originally presented, claims 1-5, 14, 19 and 21 were rejected under 35 U.S.C. 102(b) as being unpatentable over U.S. Patent 5,405,238 to Samsel, Jr. Applicant respectfully traverses this rejection as conceivably applied to the amended claims.

Samsel is directed to a three point log skidder intended to be mounted to the rear of an agricultural tractor. Although Samsel discloses a tong-like lifting device, the device is intended for lifting logs and is therefore configured in a significantly different manner than the present invention. The Samsel device includes a pair of planar tongs that are pivotally connected by a pivot bolt. Each tong is planar following a series of bends through a single plane. Because each tong is planar, when the two tongs are interconnected at a straight overlap, they extend through two separate planes. Each of the Samsel tongs terminates in a single point; apparently intended to bite into the logs. As can be seen, the construction of Samsel is significantly

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different from the construction of the claimed invention, and the Samsel device is not well-suited for the intended application of the claimed invention.

It is well settled that anticipation can only be established by a single prior art reference that identically discloses each and every element of the claimed invention. Anticipation is not shown even if the difference between the claims and the prior art reference are insubstantial. Instead, the cited reference must show exactly what is claimed. *In re Bond*, 910 F.2d 831, 15 U.S.P.Q.2d 1566 (Fed. Cir. 1990); *Structural Rubber Prod. Co. v Park Rubber Co.*, 749 F.2d 707, 223 U.S.P.Q. 1264 (Fed. Cir. 1984).

Applicant respectfully submits that the subject matter of the amended claims is not anticipated by Samsel. With regard to amended independent claims 1, Samsel fails to teach or suggest a device having arms with an offset pivot configured such that the upper and lower portions of the two arms extend through a common plane. Amended claim 1 recites that the “said upper portion of said first arm and said lower portion of said first arm extend[] along a common plane.” Amended claim 1 further recites that “said upper portion of said second arm and said lower portion of said second arm extend[] along said common plane.” As can be seen the upper and lower portions of the first arm extend through the same common plane as the upper and lower portions of the second arm. Amended claim 1 goes on to recite that:

. . .at least one of said pivot portion of said first arm and said pivot portion of said second arm is offset from said common plane an amount selected such that said upper portion and said lower portion of said first arm and said upper portion and said lower portion of said second arm extend along said common plane.

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As a result, amended claim 1 recites that the pivot portion of the first arm and/or the pivot portion of the second arm is offset from the common plane (i.e. the plane through which the upper and lower portions of each arm extends).

Samsel does not disclose a device with arms having at least one pivot portion that is offset from the plane through which the upper and lower portions of each arm extends. To the contrary, Samsel discloses a device in which the two tongs extend through different planes. Although the upper and lower portion of each tong are aligned in a single plane, the upper and lower portions of one tong do not extend through the same plane as the upper and lower portions of the other tong. Further, Samsel does not disclose at least one offset pivot location—let alone an offset pivot location that “is offset from said common plane an amount selected such that said upper portion and said lower portion of said first arm and said upper portion and said lower portion of said second arm extend along said common plane.”

Samsel also fail to disclose or suggest the subject matter of amended claim 14. Like amended claim 1, amended claim 14 recites a device with two arms in which the upper and lower portions of each arm extend through a common plane. Amend claim 14 recites:

a pivot joint pivotally interconnecting said first arm and said second arm, said pivot joint configured such that said upper portion and said lower portion of said first arm and said upper portion and said lower portion of said second arm extend through a common plane.

Samsel fails to disclose a pivot joint configured such that the upper and lower portions of the first arm and the upper and lower portions of the second arm extend through a common plane. In

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fact, as noted above, Samsel fails to disclose any structure that causes the upper and lower portions of one arm to extend through the same plane as the upper and lower portions the other arm.

It is submitted that Samsel teaches directly away from the subject matter of amended claims 1 and 14 by disclosing simple planar tongs that include a straight overlap at the pivot location. As a result of the straight overlap, the ends of the Samsel device are not in alignment. Rather, they are misaligned (like scissors) moving in different planes offset by the thickness of the tongs. The misalignment between the tongs may create an undesirable degree of torque. This torque may have a negative affect on the pivot joint and may cause undesirable twisting of the object being lifted or otherwise manipulated. Samsel not only fails to disclose aligned upper and lower arm portions, it also fails to disclose or even suggest the potential problems associated with misaligned tongs.

In view of the foregoing, it is respectfully submitted that the subject matter of amended claims 1-5, 14, 19 and 21 is not anticipated by Samsel.

B. Rejections Based on Hultquist

As originally presented, claims 1-5 were rejected under 35 U.S.C. 102(b) as being unpatentable over U.S. Patent 5,050,921 to Hultquist. Applicant respectfully traverses this rejection as conceivably applied to the amended claims.

Hultquist is directed to a clamp with a detachable cam. The Hultquist device includes a pair of clamping members that are pivotally connected by a bolt or pin. Each clamping member is planar following a series of bends through a single plane. The two

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clamping members are pivotally interconnected in a straight overlapped configuration. As a result, each clamping member extends through a separate plane, thereby creating the same misalignment discussed above in connection with the tongs of Samsel. The Hultquist device includes a cam member that holds the clamping member in the clamped position. The cam member is mounted to the face of one of the clamping members so that it is aligned with the other clamping member. The lower end of each clamping member terminates in a face clamping jaw. The jaws are not laterally extended, but are instead the width of the clamping members.

As noted above, amended claims 1 and 14 recite that the upper and lower portions of one arm extend through a common plane with the upper and lower portions of the other arm. Like Samsel, Hultquist does not disclose or suggest this subject matter. Hultquist includes simple planar clamping members that are connected in a straight overlapped arrangement. Neither clamping member includes an offset pivot portion—let alone one that is offset from the plane through which the upper and lower portions of the clamping members extend.

Applicant further submits that modification of Hultquist to include an offset pivot location would destroy its intended function. As discussed above, Hultquist includes a cam member that is mounted to the face of one clamping member to engage the other clamping member. Given the construction and connection of the cam member, the two clamping members must be misaligned for the cam member to function properly. In other words, the cam member of Hultquist relies on the offset relationship between the two clamping members to function.

In view of the foregoing, it is respectfully submitted that the subject matter of amended claims 1-5 is not anticipated by Hultquist.

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C. Rejections Based on Taniguchi

As originally presented, claims 1, 6 and 7 were rejected under 35 U.S.C. 102(b) as being unpatentable over U.S. Patent 5,078,440 to Taniguchi. Applicant respectfully traverses this rejection as conceivably applied to the amended claims.

Taniguchi is directed to an apparatus for emergency conveyance of a human being disposed on a movable body. The Taniguchi device includes a pair of arm members that are pivotally connected by a shaft. The device is intended to function as a mechanism for gripping and pulling objects that might support a human body, such as bedding. As with Samsel and Hultquist, each of the arm members of Taniguchi is planar following a series of bends through a single plane. The two clamping members are pivotally interconnected in a straight overlapped configuration. As a result, each clamping member extends through a separate plane, thereby creating the same misalignment discussed above in connection with the tongs of Samsel and the clamping member of Hultquist.

It is respectfully submitted that Taniguchi suffers from the same shortcomings as Samsel and Hultquist. Amended claim 1 recites that the upper and lower portions of one arm extend through a common plane with the upper and lower portions of the other arm. More specifically, amended claim 1 recites that the pivot portion of the first arm and/or the pivot portion of the second arm is offset from the common plane through which the upper and lower portions of each arm extends. Taniguchi does not disclose or suggest this subject matter. Taniguchi includes simple planar arm members that are connected in a straight overlapped



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arrangement. Neither arm member includes an offset pivot portion—let alone one that is offset from the plane through which the upper and lower portions of the clamping members extend.

In view of the foregoing, it is respectfully submitted that the subject matter of amended claims 1, 6 and 7 is not anticipated by Taniguchi.

D. Rejections Based on Japanese Patent JP 05286682 A

As originally presented, claims 14 and 15 were rejected under 35 U.S.C. 102(b) as being unpatentable over Japanese Patent JP 05286682 A (“JP ‘682”). Applicant respectfully traverses this rejection as conceivably applied to the amended claims.

JP ‘682 is directed to device for lifting concrete block. The device includes a pair of arms that are pivotally interconnected in a tong-like arrangement. Each arm is essentially flat (or planar) having two straight sections extending from opposite sides of a bend. The two arms are overlapped and joined by a pivot pin. The JP ‘682 device includes jaw that are specially configured to fit around the outside profile of the concrete blocks to be lifted.

Applicant respectfully submits that JP ‘682 suffers from the same shortcomings as the previously discussed prior art. Amended claim 14 requires the upper and lower portions of one arm to extend through a common plane with the upper and lower portions of the other arm. More specifically, amended claim 14 recites a pivot joint configured such that the upper portion and the lower portion of the first arm and the upper portion and the lower portion of the second arm extend through a common plane. JP ‘682 does not disclose or suggest this subject matter. JP ‘682, like Samsel, Hultquist and Taniguchi, includes simple planar arm members that are connected in a straight overlapped arrangement. Neither arm member includes an offset pivot

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portion—let alone one that is offset from the plane through which the upper and lower portions of the clamping members extend.

In view of the foregoing, it is respectfully submitted that the subject matter of amended claims 14 and 15 is not anticipated by JP '682.

E. Rejections Based on Taniguchi and Eckert

As originally presented, claims 8, 9 and 10 were rejected under 35 U.S.C. 103 as being unpatentable over Taniguchi in view of U.S. Patent 1,468,344 to Eckert. Applicant respectfully traverses this rejection as conceivably applied to the amended claims.

It is well settled that obviousness cannot be established by modifying or combining the teachings of the prior art, absent some teaching, suggestion, or incentive supporting the modification or combination. In re Geiger, 2 U.S.P.Q.2d 1276 (Fed. Cir. 1987); ACS Hospital Systems, Inc. v. Montefiore Hospital, 221 U.S.P.Q. 929 (Fed. Cir. 1984). Even if the prior art can be modified to obtain the claimed invention, that fact alone does not render the claims obvious unless the prior art suggests the desirability of the modification. In re Laskowski, 10 U.S.P.Q.2d 1397 (Fed. Cir. 1989); In re Gordon, 221 U.S.P.Q. 1125 (Fed. Cir. 1984).

The determination of obviousness rests on whether the claimed invention as a whole would have been obvious to a person of ordinary skill in the art at the time the invention was made. *Kahn v. General Motors Corp.*, 135 F.3d 1472, 45 USPQ2d 1608 (Fed. Cir. 1998). In determining obviousness, four factors should be weighed: (1) the scope and content of the prior art, (2) the differences between the art and the claims at issue, (3) the level of ordinary skill in the art and (4) secondary considerations that may be present. Among the factors supporting a

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finding of non-obviousness are satisfaction of a long-felt need, failure of others to find a solution to the problem at hand, and copying of the invention by others. *Pro-mold and Tool Co., Inc. v. Great Lakes Plastics, Inc.*, 75 F.3d 1568, 37 USPQ2d 1626 (Fed. Cir. 1996)

In establishing obviousness under section 103, the Examiner carries the burden of presenting a *prima facie* case, *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988), and must show that the references relied on teach or suggest all of the limitations of the claims. *In re Wilson*, 424 F.2d 1382, 1385 (C.C.P.A. 1970). Obviousness may not be established using hindsight or in the view of the teachings or suggestions of the inventor. *Para-Ordance Manufacturing, Inc. v. SGS Importers International, Inc.*, 73 F.3d 1085, 37 USPQ2d 1237 (Fed. Cir. 1995), *cert. denied* 117 S. Ct. 80 (1996).

M.P.E.P. 2142 states:

The legal concept of *prima facie* obviousness is a procedural tool of examination which applies broadly to all arts. It allocates who has the burden of going forward with production of evidence in each step of the examination process. See *In re Rinehart*, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976); *In re Linter*, 458 F.2d 1013, 173 USPQ 560 (CCPA 1972); *In re Saunders*, 444 F.2d 599, 170 USPQ 213 (CCPA 1971); *In re Tiffin*, 443 F.2d 394, 170 USPQ 88 (CCPA 1971), *amended*, 448 F.2d 791, 171 USPQ 294 (CCPA 1971); *In re Warner*, 379 F.2d 1011, 154 USPQ 173 (CCPA 1967), *cert. denied*, 389 U.S. 1057 (1968). The examiner bears the initial burden of factually supporting any *prima facie* conclusion of obviousness. If the examiner does not produce a *prima facie* case, the applicant is under no obligation to submit evidence of nonobviousness. If, however, the examiner does produce a *prima facie* case, the burden of coming forward with evidence or arguments shifts to the applicant who may submit additional evidence of nonobviousness, such as comparative test data showing that the claimed invention possesses improved properties not expected by the prior art. The initial evaluation of *prima facie* obviousness thus relieves both the examiner and applicant from

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evaluating evidence beyond the prior art and the evidence in the specification as filed until the art has been shown to suggest the claimed invention.

When determining the differences between the prior art and the claims at issue, it is essential to view the claims at issue as "the invention as a whole" 35 U.S.C. §103. It is legally improper to focus on the obviousness of substitutions and differences between the claimed invention and the prior art rather than on the obviousness of the claimed invention as a whole relative to that prior art. *Hybritech, Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1383, 231 USPQ 81, 93 (Fed. Cir. 1986), *cert denied*, 480 U.S. 947 (1987).

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations.

Thus, while obviousness may be found by combining references, absent a suggestion to combine the references, such combination is inappropriate. *Texas Instruments Inc. v. U.S. Int'l Trade Comm'n*, 988 F.2d 1165, 26 USPQ2d 1018 (Fed. Cir. 1993). It is insufficient that the prior art discloses the component of the claims sought to be patented. A teaching, suggestion or incentive to make the combination is required for a combination of the art to demonstrate obviousness. *Northern Telecom, Inc. v. Datapoint Corp.*, 908 F.2d 931, 15 USPQ2d 1321 (Fed. Cir. 1990). The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. *In re Mills*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990). M.P.E.P. 2143.

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The deficiencies of Taniguchi are discussed above. As it relates to amended claims 8-10, Taniguchi fails to disclose a device having arms with upper and lower portions that extend through a common plane and a pivot portion that is offset from the common plane.

Eckert is directed to a pipe lifting device. The Eckert device includes a pair of levers that are pivotally connected by a bolt in a tong-like arrangement. The Eckert device is specially configured to grip long pipe from the side. Accordingly, the Eckert device includes jaws that extend from only one side of the levers. Eckert includes flat levers that are interconnected at a straight overlap. As a result, the levers of Eckert are misaligned and do not extend through a common plane.

Applicant respectfully submits that Eckert does nothing to overcome the deficiencies of Taniguchi. Neither reference teaches or suggests a pivot portion of the first arm and/or a pivot portion of the second arm that is offset from the common plane through which the upper and lower portions of each arm extends. To the contrary, both references disclose flat arms that extend through different planes. Accordingly, no combination of Taniguchi and Eckert could result in the subject matter of amended claims 8, 9 and 10.

It is further submitted that there is no motivation for modifying these references to teach the subject matter of the amended claims. Neither Taniguchi nor Eckert teaches or suggests the problems associated with misaligned arms. In fact, they both incorporate misaligned arms and therefore embody precisely that problem which the present invention is intended to overcome. Therefore, it is respectfully submitted that it cannot fairly be said that

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there is motivation for modifying the combined references to obtain the subject matter of claims 8, 9 and 10.

F. Rejections Based on Taniguchi, Eckert and Cook

As originally presented, claims 11 and 12 were rejected under 35 U.S.C. 103 as being unpatentable over Taniguchi in view of Eckert and U.S. Patent 5,056,845 to Cook. Applicant respectfully traverses this rejection as conceivably applied to the amended claims.

As discussed above, Taniguchi and Eckert fails to disclose a device having arms with upper and lower portions that extend through a common plane and a pivot portion that is offset from the common plane. Cook does nothing to address this shortcoming. Cook discloses a material manipulation apparatus that is intended for manipulating various construction components, such as highway dividers. The device includes arms that are pivotally connected in a tong-like manner. Each arm extends through a single plane. The two arms are joined at a straight overlap. As a result, when assembled, the two arms extend through different planes from one another.

In view of the foregoing, it is respectfully submitted that the subject matter of amended claims 11 and 12 is not obvious in view of the combination of Taniguchi, Eckert and Cook.

G. Rejections Based on Samsel and Dickey

As originally presented, claims 13 and 20 were rejected under 35 U.S.C. 103 as being unpatentable over Samsel in view of U.S. Patent 5,364,147 to Dickey. Applicant respectfully traverses this rejection as conceivably applied to the amended claims 13 and 20.

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Dickey is directed to a device for lifting railroad timber. The device includes four arms (essentially two pair of arms) that are interconnected in a manner that permits the arms to close on a railroad timber. The Dickey arms are *not* connected in a conventional tong-like manner. Instead, the arms are connected to opposite ends of a crossbar. One pair of arms is pivotally connected to one end of the crossbar and the other pair of arms is pivotally connected to the opposite end of the crossbar. The crossbar is selected to have a length that is approximately the size of the object to be lifted. As a result, different crossbars are required to lift objects of different widths. The spacing between the arms is different such that one pair of arms can be fitted within the other pair of arms.

Dickey does nothing to overcome the shortcomings of Samsel. With regard to amended claim 13, Dickey does not disclose first and second arms with upper and lower portions that extend through the same plane. Rather, Dickey includes four flat arms—each extending along a different plan. With regard to claim 20, Dickey does not disclose a pivot joint configured such that the upper portion and the lower portion of the first arm and the upper portion and the lower portion of the second arm extend through a common plane. Accordingly, Applicant respectfully submits that it would not be possible to combine the teachings of Samsel and Dickey to obtain the subject matter of the amended claims. Further, neither Samsel nor Dickey provides any motivation to modify the references to obtain the subject matter of amended claims 13 and 20.

In view of the foregoing, Applicant respectfully submits that amended claims 13 and 20 are not obvious over Samsel in view of Dickey.

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H. Rejections Based on JP '682 and Eckert

As originally presented, claims 16-18 were rejected under 35 U.S.C. 103 as being unpatentable over JP '682 in view of Eckert. Applicant respectfully traverses this rejection as conceivably applied to the amended claims.

As discussed above, neither JP '682 nor Eckert discloses a pivot joint configured such that the upper portion and the lower portion of the first arm and the upper portion and the lower portion of the second arm extend through a common plane. Given that this subject matter is not taught or disclosed by these references, Applicant respectfully submits that a combination of these references could not result in the subject matter of amended claims 16-18.

Applicant further submits that there is no motivation for modifying these references to obtain a pivot joint configured such that the upper portion and the lower portion of the first arm and the upper portion and the lower portion of the second arm extend through a common plane. Neither reference even remotely suggests the benefits a pivot joint of this configuration. In fact, neither reference even recognizes the potential detriments of misaligned arms or in any way attempts to address the deficiency.

In view of the foregoing, it is respectfully submitted that the subject matter of amended claims 16-18 is not obvious over JP '682 in view of Eckert.

V. Dependent Claims

The dependent claims recite additional subject matter and are therefore even more clearly allowable over the art of record. Given that the applied references do not teach or suggest the subject matter of the amended independent claims, the dependent claims will not be discussed in



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detail. Suffice it to say that the dependent claims include additional recitations concerning the design and configuration of the arms, the jaws and the handles of the present invention.

VI. Conclusion

It is respectfully submitted that the subject matter of the amended claims is not anticipated by the art of record and that any attempt to reconstruct the subject matter of the amended claims can only be made in hindsight with the present invention as a blueprint. However, even such an improper combination does not teach or suggest the present invention for the reasons noted above. It is therefore respectfully submitted that the rejection under 35 U.S.C. §§ 102(b) and 103 are unfounded or overcome, and therefore should be withdrawn.

In view of the above amendments and remarks, it is respectfully submitted that the present application is in condition for allowance. A notice to that effect is earnestly and respectfully requested.

Respectfully submitted,

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